

Chief justice delivers 2011 State of the Judiciary address

William Ray Price Jr., chief justice of the Supreme Court of Missouri, delivered the following State of the Judiciary address Wednesday afternoon, Feb. 9, 2011, during a joint session of the General Assembly in Jefferson City, Mo.

Mr. Speaker, Mr. President, Mr. President Pro Tem, members of the General Assembly: It is my honor to deliver this 38th State of the Judiciary Address.

I never have seen a more challenging time for our state. Regardless of political philosophy, one thing is clear. Significant cuts have been made and will be made to Missouri's budget. To the extent necessary and possible, the courts have shared and will continue to share in spending reductions without complaint.

The Missouri court system, the third separate but equal constitutional branch of government, operates on less than 2 percent of the state budget. Yet in 2010 we heard more than 171,000 contract cases, 42,000 landlord tenant cases, 17,000 juvenile cases, 12,000 probate cases, 110,000 family and domestic cases, 41,000 felony cases, and 115,000 misdemeanor cases. Despite the state's economic condition, whether dipping or hopefully recovering, our work load does not diminish. The court system is a core function of government that must perform, and perform well, for our state to function and thrive.

Don't overlook the obvious. Even in this time of economic challenge, we are still the greatest civilization in the history of human kind; supported by a free market economy that can exist only within the certainty of law. Goods and services can be bought and sold, money can be exchanged, people can plan for the future, but only because they can trust in a fair and impartial judiciary to protect their property and their rights.

There are two specific concerns I want to talk with you about. I spoke about them last year, and they are still the two most important issues that we face together for the future of Missouri. One calls for action; one does not.

First, we continue to over-incarcerate nonviolent offenders, while we have failed to expand drug courts and other diversionary and reentry programs to capacity. The result is a state that is not as safe as we want it to be and a waste of taxpayer dollars.

From the 1980s, in Missouri and across the nation, we attempted to incarcerate our way out of crime and illegal drug use. We thought just putting people in prison would make them better or scare them straight. We spent billions of dollars and it did not work. We were tough on crime, but we were not smart on crime. Consider these numbers.

In 1982, 612,000 people were behind bars in state prisons across the country. By 2008, that number had risen almost fourfold to 2.3 million people. In 2010, the United States incarcerated a higher share of its population than any other country in the world. The cost has been staggering. State correctional spending across our country increased from \$11.7 billion, in 1988, to \$47.3 billion in 2008. (*One in 31 The Long Reach of American Corrections*, The Pew Center on the

States, www.pewcenteronthestates.org; *The High Budgetary Cost of Incarceration*, Center for Economic and Policy Research, June 2010, www.cepr.net)

In an article published just this January, Stanford law professor Joan Petersilia noted:

What we are seeing today is a growing recognition that our approach to dealing with convicted criminals is simply too costly. Not only is the price too high, but the benefits are too low. The states now spend an estimated \$50 billion on corrections annually, and the growth of these outlays over the past 20 years has outpaced budget increases of nearly all other essential government services (Beyond the Prison Bubble, The Wilson Quarterly, Winter 2011, p.52)

Missouri had 5,953 individuals in state prison in 1982; by 2009 the number had grown fivefold to 30,432. In that same time period, from 1982 until 2009, our Department of Corrections budget rose from \$55 million to \$665 million.

It costs more than \$16,400 per year to incarcerate an individual, without counting the cost of the prison itself. The cost of building a prison is about \$100 million. For violent criminals, who endanger innocent men, women and children, there may be little choice. But for many of the 14,700 nonviolent offenders, this prison-based strategy is not working and it is costing us an arm and a leg.

The key measurement of the failure of this strategy is the recidivism rate. That's the number of people who are returned to prison after they have been released. In Missouri, 44.6 percent of nonviolent offenders are reincarcerated within two years of release; 52 percent of nonviolent offenders are reincarcerated within three years of release; and 58.5 percent of nonviolent offenders are reincarcerated within five years of release. More than one half of the people released from our penitentiaries are returned within five years.

A real life example of recidivism was the 35-year-old St. Joseph man who was arrested for drunken driving on June 16, 2010, just three hours after he was released from prison. (The Kansas City Star, July 17, 2010)

Punishment is a necessary part of our criminal justice system. But our real goal for nonviolent offenders is to teach them their lesson so they can become productive law-abiding members of our society. The goal is not to lock them into a life of crime, to make them permanent wards of the state on an installment program of incarceration after incarceration, at \$16,400 per year. Newt Gingrich wrote this:

The key to public safety and fiscal sanity is not just getting dangerous people off the streets but also making sure that men and women who eventually leave prison have changed and can stay crime-free on the outside. (Atlanta Journal Constitution, March 23, 2010)

Governor Rick Perry of Texas said it this way:

I believe we can take an approach that is both tough and smart ... [T]here are thousands of non-violent offenders in the system whose future we cannot ignore. Let's focus more resources on rehabilitating those offenders so we can ultimately spend less money locking them up again. (www.rightoncrime.com)

It should be absolutely clear that when half of the nonviolent offenders are returned to prison after release, we have not taught them the right lesson. And, the danger of crime – the millions of dollars of cost to the Missouri taxpayer – goes on and on and on.

Over-incarceration of nonviolent offenders has been a big-government, throw-money-at-the-problem strategy that simply did not and does not work. Despite our tough-on-crime rhetoric, it is time that we face reality. Prison is the most expensive and least effective strategy for a significant number of nonviolent offenders. All it does is house them in expensive buildings, guard them with state workers, feed and give them health care paid for with precious state dollars and force them to associate with criminals more dangerous than they are. By spending all of our money on prison, there is not enough left to spend on the alcohol and drug treatment and the education and job training, necessary to break their cycle of crime. Proof is in the numbers: 44.6 percent are back in two years, 58.5 percent are back in five years.

A group called Right on Crime, whose members include Grover Norquist, Edwin Meese and William Bennett, said this:

... the corrections system must align incentives with our goals of public safety, victim restitution and satisfaction, and cost-effectiveness, thereby moving from a system that grows when it fails to one that rewards results. (www.rightoncrime.com)

Professor Petersilia said it this way:

It should not come as a surprise to learn that we have a corrections system that does not correct Former prisoners account for an estimated 15 to 20 percent of all arrests among adults. That means thousands of Americans are being victimized every year by criminals who have already done time without experiencing "correction." (Beyond the Prison Bubble, The Wilson Quarterly, Winter 2011, p.53)

There is a better way. All across the country, states are turning to cheaper, more effective, alternative sanctions than prison for nonviolent offenders.

Drug courts are one of the best examples of tough, effective, local alternatives to prisons. Depending on the study, between 60 and 80 percent of people in prison are there for drug-related crimes or have drug or alcohol issues. Study after study, nationally and in Missouri, show that drug courts are the most effective way to deal with drug- and alcohol-addicted people at a fraction of the cost of prison. Missouri has more than 9,700 drug court graduates with a minimal recidivism rate.

There are other evidence-based criminal sanction strategies, each matched to the particular risks and characteristics of the offender that also work that are far less expensive and far more effective than prison. We need to move from anger-based, prison-focused sentencing that ignores cost and effectiveness to evidence-based alternative sanctions that change troubled lives and focus on results.

With your help, we have expanded drug courts and DWI courts across Missouri. Unfortunately, they are still underfunded by half. We barely have scratched the surface with family drug courts and reentry courts. But I especially want to tell you about two pilot programs. First, in Jackson, Greene and St. Louis counties and in St. Louis city, we tested a program to divert juveniles from detention facilities. The program reduced detention admissions by approximately 50 percent with better results from the juveniles. The savings from this program will be substantial. We are expanding this program into five additional circuits.

The other pilot program is veterans court. Veterans court focuses on returning veterans whose psychological scars from service lead them to drugs and trouble and sometimes violence when they get home. In St. Louis city, Drug Court Commissioner Jim Sullivan has established a veterans court with 12 participants. Drug Court Commissioner Phil Britt is in the process of establishing a rural veterans court in Butler, Carter, Dunklin, Ripley, Stoddard and Wayne counties with a target population of 20 to 25 veterans. We owe our veterans this kind of help when they need it. But our resources are already stretched thin.

From a moral, a fiscal and a law-and-order perspective, drug courts, DWI courts, juvenile diversion programs, veterans courts, reentry courts and community supervision strategies are better investments of taxpayer money, for their target populations, than prisons.

I want to be absolutely clear. I am not advocating that we reduce prison populations just to save money. Nonviolent offenders are still law breakers, and they will break laws until they learn their lesson. What I am saying is that we need to do a better job teaching nonviolent offenders the right lessons. That takes more than prison; it takes more than slap-on-the-wrist-probation. Drug and alcohol addiction must be broken; discipline and job skills must be learned. When that can be done better, outside of expensive prison walls, that is what we should do. Results matter, public safety matters, taxpayer dollars matter, saving lives and restoring families matter.

I also want to make clear that this is not a management problem at the Department of Corrections. Director Lombardi, his staff, and the probation and parole officers of this state, are excellent and dedicated public servants. Because of their leadership and because of the nearly 3,000 drug court diversions each year, we have avoided building at least two new prisons. That is, at least, \$200 million of avoided costs, just for the buildings; let alone the tens of millions of dollars of operational costs. Missouri has started in the right direction. But we need to go farther and to do better.

The people of America are ready for a change. A poll taken last September showed that 86 percent of Americans agreed that “We have too many low risk, nonviolent offenders in prison. We need alternatives to incarceration that cost less and save our expensive prison space for

violent and career criminals.” Eighty-nine percent of Americans agreed that “Ninety-five percent of people in prison will be released. If we are serious about public safety, we must increase access to treatment and job training programs so they can become productive citizens once they are back in the community.” And 84 percent of Americans agreed that “Prisons are a government program, and just like any other government program they need to be put to the cost-benefit test to make sure taxpayers are getting the best bang for their buck.” (*Public Attitudes on Crime and Punishment*, The Pew Center on the States, www.pewcenteronthestates.org)

We need to expand our existing diversionary treatment court programs. We need to require, as a condition for early release from prison, education or job training and drug treatment, if needed. We need to establish a more robust program for reentry supervision for those who are released. The reduction in the number of nonviolent offenders in our prisons will more than fund these efforts. We need to be tough and smart on crime.

Transitioning from where we are to where we need to be is the hard part. It will take detailed study and cooperation among the state, the counties, the courts, the prosecutors, the defenders and our law enforcement agencies. I am thankful to your leaders, Speaker Tilley and President Pro Tem Mayer, who have joined with Governor Nixon and me in signing a letter seeking a federal Justice Reinvestment Initiative grant to study how this should be done. They have shown political courage and the type of bipartisan leadership necessary to make Missouri a safer and better place. Please recognize Speaker Tilley and President Pro Tem Mayer for their far-sighted leadership.

The second major issue that I want to talk with you about is a fair and impartial judiciary. Solomon is the example of the greatest judge. When he first became King of Israel, the Revised Standard Version of the Bible says he asked the Lord for “an understanding mind to govern thy people, that I may discern between good and evil.” The New Jerusalem Bible and most other translations have Solomon asking for an understanding “heart,” instead.

I never have worried about this difference in translation, because both are true. A good judge needs an understanding mind and an understanding heart to find justice.

It is not easy finding justice. Justice is not a physical thing that you can touch or hold or measure. Often it is shaped by the eye of the beholder and, often, relative to the beholder’s particular point of view. What seems just to one may seem unjust to another.

A good judge must have the courage to accept that not all people will see justice as he or she does. Sometimes, a good judge must have the courage to risk the anger of the majority, to protect the rights of the individual – rights that we prize and that are guaranteed by our national and state constitutions. That is why Alexander Hamilton said the “independence of the judges is ... requisite to guard the Constitution and the rights of individuals.” (The Federalist #78)

Our job is different than yours. You serve the majority. You make broad policy decisions that apply to everyone. You make campaign promises and are expected to uphold them. If something

does not work, if it is worded incorrectly, or if the will of the majority changes, you can change your laws year by year.

Our job is more limited. We rule individual case by individual case. Whether it is a case for a business fighting for its economic life, a crippled plaintiff who no longer can support himself or his family, parents fighting for the custody of a loved child, or a person accused of a crime with his liberty or life at stake, we rule individual case by individual case, with each individual having only that one chance for justice. In every case, someone loses. Fairness, impartiality and a level playing field, not subject to outside influence or manipulation, not dependent on a preexisting promise, are the absolute necessity.

With this in mind, we need to talk about the Missouri Plan for selecting judges. The plan was adopted by the people of Missouri by initiative petition in 1940. It was in response to the Pendergast political machine's attempt to control the Supreme Court of Missouri. It was a plan established by the people to protect their courts from political manipulation and control.

For those of you who are new to the legislature, let me explain how the Missouri Plan works. For vacancies on the Supreme Court and the Court of Appeals, there is a seven-member commission. The commission is made up of three lawyers elected by lawyers from the eastern, western and southern districts of the state. The lawyers' role is to safeguard the professional quality of the candidates. The lawyers serve staggered six-year terms. The commission also has three members who cannot be lawyers, appointed by the governor, again for staggered six-year terms. They evaluate the candidates from the point of view of regular citizens of Missouri. To the extent these commissioners are appointed by the governor, they reflect the political mood of the state. Finally the chief justice of the Supreme Court serves on the commission. In my experience, the chief justice functions neither as a lawyer, nor as a lay person, but as a representative of the judiciary as a whole. Each nominating commission for trial judges, in Jackson, Clay, Platte, Greene and St. Louis counties and St. Louis city, has one fewer lawyer and non-lawyer, and the presiding judge of the local court of appeals replaces the chief justice.

The commission evaluates the applicants. It screens out those who from a legal or any other point of view might not be the best choice to serve as a judge and selects the three candidates the commission believes would be best. The governor may appoint any of the three individuals submitted to him, for any reason. The governor's appointee begins to serve immediately but is subject to a retention vote of the people at the next general election after a year of service, and again, every 12 years thereafter. Missouri Plan judges are accountable directly to the people.

The brilliance of the Missouri Plan is that it balances the need for legal ability, everyday common sense and responsibility to the people, in a way that preserves the integrity and the fairness and the impartiality of the judge. It also checks the power of all concerned, the lawyers, the citizens, the chief justice, the governor, and most importantly, it allows a very real check and balance to the people by the retention vote.

But, in some ways, the quality of a judge is like the quality of justice. It is perceived in the eye of the beholder, colored by the beholder's interests and desires. What one person sees as a great appointment may be criticized by another; perhaps not relative to ability or integrity or fairness,

but by a desire for a particular ideological viewpoint and the expectation of a particular type of ruling. The Missouri Plan was created to seek judges of ability, integrity and fairness; not to lock in any particular viewpoint.

There are two alternatives that have been suggested by critics of the Missouri Plan. I am certain that those who suggest these alternatives are sincere in their concerns, but I do not believe that they understand the dangers inherent in their suggested alternatives.

The worst alternative is direct elections of judges. The reason is simple. Money. The amount of money involved in conducting statewide races will destroy the public's perception, and perhaps the actual integrity, of our judicial system.

As special interest politics have increased, the amount of money directed to judicial elections has skyrocketed. For the 10- year period from 1990 to 1999, \$83.3 million was spent on judicial elections. For the 10-year period from 2000 to 2009, that amount more than doubled to \$206.9 million. (*The New Politics of Judicial Elections: 2000-2009*, The Brennan Center for Justice, www.brennancenter.org)

It is even more shocking that most of this money comes from a small group of big spenders. A study of 29 elections in the nation's 10 most costly states from 2000 to 2009 showed that the top five contributors in each race invested an average of \$473,000 each, while the remaining 116,000 contributors averaged just \$850 each. (*The New Politics of Judicial Elections: 2000-2009*, The Brennan Center for Justice, www.brennancenter.org)

There can be no way that this much money from so few people can be good. In fact, a Harris poll released this past September revealed that 70 percent of Americans, both democrats and republicans, believed that campaign contributions have had a significant impact on courtroom decisions. (The Birmingham News, September 11, 2010)

Remember the *Avery* case from Illinois in which an Illinois Supreme Court justice cast the deciding vote in a \$450 million lawsuit in favor of a company after receiving more than \$1 million in campaign contributions from those connected to the company. Remember the *Massey* case from West Virginia in which a new West Virginia Supreme Court justice cast the deciding vote in a \$50 million lawsuit after the CEO of that company spent approximately \$3 million of independent expenditures to defeat the new judge's opponent.

Big money in judicial elections is a scandal.

I am not naive. There are political and ideological issues that divide our nation and that divide our state. It is our strength as a democracy to allow the full debate and resolution of those issues by and before the people. But that is a process for you to conduct here in the legislative chambers of government. It is not a process to be confused with the fair and just resolution of individual disputes, each case according to its evidence, each case according to the law, each case with fairness and impartiality. Most importantly, each case as the only opportunity for justice for the Missouri citizens involved.

Whether rich, poor, black, white, plaintiff, defendant, individual, corporation, prosecutor, accused, republican, democrat or independent, the people of Missouri deserve justice when they come to court. They deserve a level playing field and a fair chance. They deserve judges who make decisions on evidence and law, not judges who have been influenced by big money contributions from special interests.

Judges who have been bought and paid for have not been the Missouri way since 1940, and they should not be the Missouri way of the future.

Another suggestion is to adopt a plan modeled after the federal system. That, too, is problematic. Federal judges have life tenure; they are not subject to retention votes. The federal plan has no commission of lawyers or lay people to filter the candidates regarding legal ability, reputation or simple common sense. It would be a purely political system where only, the governor and senators, are included. I am sure you can imagine the bargaining that might take place, perhaps involving issues wholly unrelated to the nominee. You don't have to imagine the gridlock that takes place when the senate is controlled by one party and the governor is of the other party. In a 2002 speech then attorney general John Ashcroft declared that the federal system "has broken down" because the United States Senate would not act on President Bush's nominees for judges. That may well happen again with President Obama's nominees. What would happen here for nominees between May and January: delay, or special session after special session. Modifications to the federal system might attempt to solve these problems, but they would only increase the uncertainty and risk about how a federal plan might work in Missouri, with untested modifications.

Other, more measured, changes also might be proposed to the Missouri Plan; changes that preserve the structure of the plan, but focus on the political balance of the commissioners, the timing of the commissioners' terms, or the number of nominees on the panel submitted to the governor. Such changes might be less dangerous, but they are still fraught with the risk of unintended consequences. The greater the change, the greater the number of changes, the greater the risk.

In the past two years, the Court has taken great strides to increase the transparency of the Missouri Plan to make it more open to the people. Last year, we amended the rules to release the names of the applicants. This year, we amended the rules to open the interview process to the public, to release the final vote for the panel of nominees and to encourage nominations directly from the public. These changes will allow the people of Missouri to see for themselves how the Missouri Plan works and to see the choices it makes when presenting a panel of nominees to the governor. These are significant and good changes. Both Kansas and Iowa have followed our lead and opened their interviews to the public.

A detailed study published in May 2008 titled, *Is The 'Missouri Plan' Good for Missouri? The Economics of Judicial Selection*, authored by professors Joshua Hall and Russell Sobel, noted:

"A growing literature in economics has found that judicial independence and quality matter for economic growth across countries and states.

Most significantly, they concluded:

“Based on our analysis Missouri’s current system is far superior to several of the alternatives such as partisan elections, nonpartisan elections, and gubernatorial appointment with the approval only of some type of executive council.” (Policy Study No. 15, Show-Me Institute, May 21, 2008)

Justice is sacred but fragile. It belongs to the people, not to either political party, not to any special interest. A system of justice is necessary to support our economy and to preserve our individual rights and freedoms. A system of justice can exist only so long as the people have trust and confidence that it is fair and impartial. Any proposed change to the Missouri Plan should be considered only with the greatest care and caution. I am afraid that it is more likely that any change will bring more harm than good.

Each of you has been chosen by your fellow citizens to come here and represent them in our government. It is a great honor that they have bestowed upon you. It is an honor that comes with great responsibility. Do not take for granted your importance. What you do will make a difference, not in theory, not in political sound bytes, but in the real lives of real Missourians now and for years to come.

Having served here for nearly 18 years, I understand your sacrifices. I understand some of your pressures. I understand your best intentions. I respect you all for your willingness to serve.

I know that each of you want to do your best. I know that each of you want to do what is right and good. It is not my place to advise you on most matters. But preserving a system of justice in Missouri that our people can have faith and confidence in, that cannot be bought, is something that’s right and good; reforming our criminal sentencing practices to save millions and millions of dollars, to break the cycle of addiction and crime, and to make Missouri a safer place is something right and good. It is what should be done. It is something you and your families and all of the people of Missouri can be proud of.

Thank you.